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NATIONAL NUTRITION MONITORING AND RELATED RESEARCH ACT OF 1989

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Mr. GLENN, from the Committee on Governmental Affairs, submitted the following

REPORT

[To accompany S. 253]

The Committee on Governmental Affairs, to which was referred the bill (S. 253) to establish a coordinated National Nutrition Monitoring and Related Research Program and a comprehensive plan for the assessment of the nutritional and dietary status of the United States population and the nutritional quality of the United States food supply, having considered the same, reports favorably thereon and recommends that the bill do pass.

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I. PURPOSE

The purposes of S. 253 are to make more effective use of expenditures for nutrition monitoring and to establish and implement a plan for the National Nutrition Monitoring and Related Research Program which is to assess the dietary and nutritional status of the people of the United States.

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II. BACKGROUND

The lack of a comprehensive national nutrition monitoring system has hindered efforts by the American public and policymakers to fully understand and address the quality of the food supply, ensure that the nutritional needs of the population are met, and acquire a data base that will permit the planning and guiding of agriculture, nutrition and health research.

The United States Department of Agriculture [USDA] was first instructed to investigate the needs of human nutrition in 1893. Since that time, a number of surveys have been completed by USDA and the Department of Health, Education and Welfare (now the Department of Health and Human Services). While these surveys have provided valuable nutritional information, a need remains for a comprehensive, long-term program that will provide timely, integrated data on food, nutrition, and health-related issues.

A legislative mandate is necessary if we are to sustain the progress that already has been made toward assuring the United States of a continuous and comprehensive nutrition monitoring system. S. 253 will strengthen the developing cooperation between federal agencies and provide the mechanisms necessary to incorporate the needs of the groups dependent upon the data and services performed by a national nutrition monitoring system. S. 253 also requests the authorization and appropriation of funds so that nutrition monitoring will be identified as a separate line item of the budgets of the appropriate agencies, thereby giving Congress and the people the ability to exercise their oversight responsibilities to ensure the effective administration of the National Nutrition Monitoring and Related Research Program.

III. LEGISLATIVE HISTORY

National nutrition monitoring priorities and a system to collect such data have been the subject of legislative activity in the U.S. Congress since 1977. Hearings held by the House Committee on Science and Technology's Subcommittee on Science, Research and Technology in 1977 prompted a mandate in P.L. 95–113, the Food and Agriculture Act of 1977, for USDA and DHEW (now the DHHS) to submit a proposal for a comprehensive nutrition status monitoring system. The proposal, submitted to Congress in March 1978, detailed the type of data that was to be collected but failed to describe how the plan would be implemented.

The House Committee on Science and Technology Subcommittee requested that the General Accounting Office (GAO) review the proposal. In June 1978, GAO reported several weaknesses in the proposal and recommended that the administration develop an implementation plan. The proposal was returned to the agencies with a directive from the Congress to proceed with an implementation plan for a national nutrition monitoring system.

The implementation plan had not been received by the Congress by mid-1981. Joint hearings were held in June 1981, by the House Committee on Science and Technology's Subcommittee on Science, Research and Technology and the House Committee on Agriculture's Subcommittee on Department Operations, Research and For-

eign Agriculture to obtain from the administration a commitment for submission of the implementation plan. The HHS-USDA Joint Implementation Plan for a Comprehensive National Nutrition Monitoring System was received by the Congress in September 1981. One part of this plan was a calendar of the critical features of the implementation activities that were to be performed to allow the National Nutrition Monitoring System to be in place in 1987.

Joint oversight hearings were held by the two subcommittees in 1982 and 1983. The results of these hearings indicated that: the implementation plan focused primarily on the Nationwide Food Consumption Survey [NFCS] and the National Health and Nutrition Examination Survey [NHANES]; the timeliness of data analysis and coordination had improved but remained inadequate; limited attention was given to the development of research methods and standards needed to enhance the effectiveness of nutrition monitoring; a survey design had not been developed to provide for an annual continuous monitoring system; and no budgetary data existed on current expenditures for nutrition monitoring activities, nor had projections been made for the future implementation of the system. While some progress was being made and both departments repeatedly made commitments to implement the nutrition monitoring system, some critical features of the Implementation Plan had not yet been completed, even though these steps were necessary before the coordinated system could begin in 1987.

During the 1983 hearing, public witnesses stated that an effective nutrition monitoring system was extremely important to the development of the agriculture, nutrition, and health policies in the United States and that a legislative mandate would assist in establishing a central focus and identifiable resources for federal nutrition monitoring activities. In response to the nutrition monitoring needs presented at this oversight hearing, Congressmen MacKay, Brown and Walgren introduced H.R. 4684, the National Nutrition Monitoring and Related Research Act on January 30, 1984.

H.R. 4684 was referred jointly to the House Committee on Agriculture and the Committee on Science and Technology. The Subcommittee on Science, Research and Technology of the Committee on Science and Technology and the Subcommittee on Department Operations, Research and Foreign Agriculture of the Committee on Agriculture held a joint hearing on the bill on June 20, 1984. The Subcommittee on Science, Research and Technology met on July 25, 1984, adopted an amendment in the nature of a substitute and ordered the bill reported to the Committee on Science and Technology. The bill was further amended by the full Committee on August 8, 1984. On September 20, 1984, the Committee favorably reported the bill by a roll call vote.

On October 2, 1984, the Committee on Science and Technology, with the concurrence of the Committees on Agriculture and Energy and Commerce, which had requested sequential referral of the bill, brought H.R. 4684 before the full House for consideration under suspension of the rules, requiring a two-thirds vote for passage. The recorded vote was 265 yeas and 147 nays, thus the bill was not passed.

On May 8, 1985, H.R. 2436, the National Nutrition Monitoring and Related Research Act of 1985 was introduced by Congressmen

MacKay, Brown, Walgren and 28 cosponsors. The bill was jointly referred to the Committees on Agriculture and Science and Technology. On June 25, 1985, a joint hearing was held on H.R. 2436 with the Subcommittee on Science, Research and Technology of the Committee on Science and Technology and the Subcommittees on Department Operations, Research and Foreign Agriculture, and Domestic Marketing, Consumer Relations and Nutrition of the Committee on Agriculture.

The Subcommittee on Science, Research and Technology met on October 31, 1985, and after considering H.R. 2436, adopted by voice vote an amendment in the nature of a substitute. The Subcommittee ordered the bill reported, as amended by voice vote, to the Committee on Science and Technology. The bill was brought to the full Committee on Science and Technology for consideration on November 21, 1985. The Committee adopted the report of the Subcommittee, and began consideration of the Subcommittee amendment. The Committee continued consideration of the bill on February 19, 1986, further amending the substitute, and ordered it favorably reported to the House. Following a similarly favorable report by the Committee on Agriculture, the bill was placed on the Union Calendar June 19, 1986. After considerable debate, H.R. 2436 passed the House, as amended, by a vote of 305 to 85 on June 26, 1986.

S. 1569, the Improved Public Health Through Nutrition Monitoring Act of 1985, was introduced on August 1, 1985, by Senator Bingaman and cosponsored by Senators Matsunaga, Chiles, Hollings, Gore, Mitchell, Boschwitz, Simon, Levin, Stennis, Riegle, and Glenn. The bill was referred to the Committee on Governmental Affairs.

On July 14, 1986, the House-passed version of H.R. 2436 was received in the Senate and referred to the Committee on Governmental Affairs. A markup was held August 12, 1986, at which S. 1569 was set aside and H.R. 2436 was ordered reported favorably without amendment. The Senate did not complete action on the bill by October 18, 1986, when the 99th Congress recessed, so the bill died.

On April 23, 1986, the National Nutrition Monitoring and Related Research Act of 1987 was introduced in both bodies of Congress. H.R. 2151 was introduced by Congressmen MacKay, Brown, and Walgren and 20 other cosponsors. S. 1081 was introduced by Senator Bingaman along with 12 cosponsors. The bill was referrred to the House Committees on Agriculture and Science, Space, and Technology; in the Senate, to the Committee on Governmental Affairs.

On March 1, 1988, the Senate Committee on Governmental Affairs held a hearing to examine nutrition monitoring in the context of current federal nutrition research and dietary guidance activities. On March 22, 1988, the Committee held a hearing on the legislation itself. On April 14, 1988, the Committee met and, after considering S. 1081, adopted by voice vote an amendment in the nature of a substitute. The Committee then ordered the bill favorably reported to the Senate. On August 9, 1988, the Senate passed the amended version of S. 1081 by voice vote.

The Senate-passed bill was received in the House of Representatives and referred to the Committee on Science and Technology, which held a hearing on S. 1081 on September 30, 1988. The Com-

mittee met to discuss the bill, agreed to an amendment, and favorably reported S. 1081 on October 5, 1988. On October 12, 1988, the House of Representatives passed the amended version of the bill by a vote of 311–84 and then returned the bill to the Senate for further consideration.

Final legislative action on S. 1081 occurred on October 19, 1988, when the Senate passed S. 1081, as amended, by voice vote.

On November 8, 1988, President Ronald Reagan pocket-vetoed S. 1081.

In the 101st Congress, Senator Bingaman and 16 cosponsors introduced S. 253 on January 25, 1989. Companion legislation, H. R. 677, was introduced in the House by Congressmen Walgren, Brown, and Roe on January 27, 1989. These measures are vitually identical to the legislation that passed the House and Senate in the 100th Congress.

On June 23, 1989, the Senate Committee on Governmental Affairs held a hearing on S. 253. The Committee met to discuss the bill on July 13, 1989, and ordered it favorably reported.

IV. TEXT OF BILL AS REPORTED

A BILL To establish a coordinated National Nutrition Monitoring and Related Research Program, and a comprehensive plan for the assessment of the nutritional and dietary status of the United States population and the nutritional quality of food consumed in the United States, with the provision for the conduct of scientific research and development in support of such program and plan.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "National Nutrition Monitoring and Related Research Act of 1989".

PURPOSES

SEC. 2. The purposes of this Act are to—

(1) make more effective use of Federal and State expenditures for nutrition monitoring, and enhance the performance and benefits of current Federal nutrition monitoring and related research activities;

(2) establish and facilitate the timely implementation of a coordinated National Nutrition Monitoring and Related Research Program, and thereby provide a scientific basis for the maintenance and improvement of the nutritional status of the people of the United States and the nutritional quality (including, but not limited to, nutrient and nonnutritive content) of food consumed in the United States;

(3) establish and implement a comprehensive plan for the National Nutrition Monitoring and Related Research Program to assess, on a continuing basis, the dietary and nutritional status of the people of the United States and the trends with respect to such status, the state of the art with respect to nutrition monitoring and related research, future monitoring and related research priorities, and the relevant policy implications;

(4) establish and improve the quality of national nutritional and health status data and related data bases and networks, and stimulate research necessary to develop uniform indicators, standards, methodologies, technologies, and procedures for nutrition monitoring;

(5) establish a central Federal focus for the coordination, management, and direction of Federal nutrition monitoring activities;

(6) establish mechanisms for addressing the nutrition monitoring needs of Federal, State, and local governments, the private sector, scientific and engineering communities, health care professionals, and the public in support of the foregoing purposes; and

(7) provide for the conduct of such scientific research and development as may be necessary or appropriate in support of such purposes.

DEFINITIONS

SEC. 3. As used in this Act—

(1) the term "nutrition monitoring and related research" means the set of activities necessary to provide timely information about the role and status of factors that bear on the contribution that nutrition makes to the health of the people of the United States, including—

(A) dietary, nutritional, and health status measurements;

(B) food consumption measurements;

(C) food composition measurements and nutrient data banks;

(D) dietary knowledge and attitude measurements; and

(E) food supply and demand determinations;

(2) the term "coordinated program" means the National Nutrition Monitoring and Related Research Program established by section 101(a);

(3) the terms "Interagency Board for Nutrition Monitoring and Related Research" and "Board" mean the Federal coordinating body established by section 101(c);

(4) the term "comprehensive plan" means the comprehensive plan prepared under section 103;

(5) the term "Joint Implementation Plan for a Comprehensive National Nutrition Monitoring System" means the plan of that title submitted to Congress in September 1981 by the Department of Agriculture and the Department of Health and Human Services, under section 1428 of the Food and Agriculture Act of 1977 (7 U.S.C. 3178);

(6) the terms "National Nutrition Monitoring Advisory Council" and "Council" mean the advisory body established under section 201;

(7) the term "Secretaries" means the Secretary of Agriculture and the Secretary of Health and Human Services, acting jointly;

(8) the term "local government" means a local general unit of government or local educational unit; and

(9) the term "nutritional quality" means—

(A) the appropriate levels of individual nutrients in the diet;

(B) the appropriate levels between nutrients in the diet;

(C) the bioavailability of nutrients such as absorption, digestion, and utilization; and

(D) the nutritional importance of non-nutrient substances such as fiber, phytate, and such substances that are naturally found in the food supply.

TITLE I—NUTRITION MONITORING AND RELATED RESEARCH

ESTABLISHMENT OF THE COORDINATED PROGRAM

SEC. 101. (a) There is established a ten-year coordinated program, to be known as the National Nutrition Monitoring and Related Research Program, to carry out the purposes of this Act.

(b) The Secretaries shall be responsible for the implementation of the coordinated program.

(c) To assist in implementing the coordinated program, there is established an Interagency Board for Nutrition Monitoring and Related Research, of which an Assistant Secretary in the Department of Agriculture (designated by the Secretary of Agriculture) and an Assistant Secretary in the Department of Health and Human Services (designated by the Secretary of Health and Human Services) shall be joint chairpersons. The remaining membership of the Board shall consist of additional representatives of Federal agencies, as determined appropriate by the joint chairpersons of the Board. The Board shall meet no less often than once every three months for the two-year period following the date of the enactment of this Act, and when appropriate thereafter.

(d) To establish a central focus and coordinator for the coordinated program, the Secretaries may appoint an Administrator of Nutrition Monitoring and Related Research. The Administrator shall—

(1) be an individual who is eminent in the field of nutrition monitoring and related areas, and be selected on the basis of the established record of expertise and distinguished service of such individual; and

(2) administer the coordinated program with the advice and counsel of the joint chairpersons of the Board, serve as the focal point for the coordinated program, and serve as the Executive Secretary for the National Nutrition Monitoring Advisory Council.

FUNCTIONS OF THE SECRETARIES

SEC. 102. (a) The Secretaries, with the advice of the Board, shall—

(1) establish the goals of the coordinated program and identify the activities required to meet such goals, and identify the responsible agencies with respect to the coordinated program;

(2) update the Joint Implementation Plan for a Comprehensive National Nutrition Monitoring System, and integrate it into the coordinated program;

(3) ensure the timely implementation of the coordinated program and the comprehensive plan prepared under section 103;

(4) include in the coordinated program and the comprehensive plan a competitive grants program, in accordance with the provisions of this Act, to encourage and assist the conduct, by Federal and non-Federal entities on an appropriate matching funds basis, of research (including research described in section 103(a)(3)) that will accelerate the development of uniform and cost-effective standards and indicators for the assessment and monitoring of nutritional and dietary status and for relating food consumption patterns to nutritional and health status;

(5) include in the coordinated program and the comprehensive plan a grants program, in accordance with the provisions of this Act, to encourage and assist State and local governments in developing the capacity to conduct monitoring and surveillance of nutritional status, food consumption, and nutrition knowledge and in using such capacity to enhance nutrition services (including activities described in sections 103(a)(5) and 103(b)(9));

(6) include in the coordinated program each fiscal year an annual interagency budget for each fiscal year of the program;

(7) foster productive interaction, with respect to nutrition monitoring and related research, among Federal efforts, State and local governments, the private sector, scientific communities, health professionals, and the public;

(8) contract with a scientific body, such as the National Academy of Sciences or the Federation of American Societies for Experimental Biology, to interpret available data analyses, and publish every two years, or more frequently if appropriate, a report, on the dietary, nutritional, and health-related status of the people of the United States and the nutritional quality (including, but not limited to, nutrient and nonnutritive content) of food consumed in the United States; and

(9)(A) foster cost recovery management techniques in the coordinated program; and

(B) impose appropriate charges and fees for publications of the coordinated program, including print and electronic forms of data and analysis, and use the proceeds of such charges and fees for purposes of the coordinated program (except that no such charge or fee imposed on an educational or other nonprcfit organization shall exceed the actual costs incurred by the coordinated program in providing the publications involved).

(b) The Secretaries shall submit to the President for transmittal to Congress by January 15 of each alternate year, beginning with January 15 following the date of the enactment of this Act, a biennial report that shall—

(1) evaluate the progress of the coordinated program;

(2) summarize the results of such coordinated program components as are developed under section 103;

(3) describe and evaluate any policy implications of the analytical findings in the scientific reports required under subsec-

tion (a)(8), and future priorities for nutrition monitoring and related research;

(4) include in full the annual reports of the Council provided for in section 202; and

(5) include an executive summary of the report most recently published by the scientific body, as provided for in subsection (a)(8).

DEVELOPMENT OF THE COMPREHENSIVE PLAN FOR THE NATIONAL NUTRITION MONITORING AND RELATED RESEARCH PROGRAM

SEC. 103. (a) The Secretaries, with the advice of the Board, shall prepare and implement a comprehensive plan for the coordinated program which shall be designed to—

(1) assess, collate data with respect to, analyze, and report, on a continuous basis, the dietary and nutritional status of the people of the United States, and the trends with respect to such status (dealing with such status and trends separately in the case of preschool and school-age children, pregnant and lactating women, elderly individuals, low income populations, blacks, Hispanics, and other groups, at the discretion of the Secretaries), the state of the art with respect to nutrition monitoring and related research, future monitoring and related research priorities, and relevant policy implications of findings with respect to such status, trends, and research;

(2) sample representative subsets of identifiable low income populations (such as Native Americans, Hispanics, or the homeless), and assess, analyze, and report, on a continuous basis, for a representative sample of the low income population, food and household expenditures, participation in food assistance programs, and periods experienced when nutrition benefits are not sufficient to provide an adequate diet;

(3) sponsor or conduct research necessary to develop uniform indicators, standards, methodologies, technologies, and procedures for conducting and reporting nutrition monitoring and surveillance;

(4) develop and keep updated a national dietary and nutritional status data bank, a nutrient data bank, and other data resources as required;

(5) assist State and local government agencies in developing procedures and networks for nutrition monitoring and surveillance; and

(6) focus the activities of the Federal agencies.

(b) The comprehensive plan, at a minimum, shall include components to—

(1) maintain and coordinate the National Health and Nutrition Examination Survey (NHANES) and the Nationwide Food Consumption Survey (NFCS);

(2) provide, by 1991, for the continuous collection, processing, and analysis of nutritional and dietary status data through stratified probability samples of the people of the United States designed to permit statistically reliable estimates of high-risk groups and geopolitical or geographic areas, and to

permit accelerated data analysis (including annual analysis, as appropriate);

(3) maintain and enhance other Federal nutrition monitoring efforts such as the Centers for Disease Control Nutrition Surveillance Program and the Food and Drug Administration Total Diet Study, and, to the extent possible, coordinate such efforts with the surveys described in paragraphs (1) and (2);

(4) incorporate, in survey design, military and (where appropriate) institutionalized populations;

(5) complete the analysis and interpretation of the data sets from the surveys described in paragraph (1) collected prior to 1984 within the first year of the comprehensive plan;

(6) improve the methodologies and technologies, including those suitable for use by States and localities, available for the assessment of nutritional and dietary status and trends;

(7) develop uniform standards and indicators for the assessment and monitoring of nutritional and dietary status, for relating food consumption patterns to nutritional and health status, and for use in the evaluation of Federal food and nutrition intervention programs;

(8) establish national baseline data and procedures for nutrition monitoring;

(9) provide scientific and technical assistance, training, and consultation to State and local governments for the purpose of—

(A) obtaining dietary and nutrition status data;

(B) developing related data bases; and

(C) promoting the development of regional, State, and local data collection services to become an integral component of a national nutritional status network;

(10) establish mechanisms to identify the needs of users of nutrition monitoring data and to encourage the private sector and the academic community to participate in the development and implementation of the comprehensive plan and contribute relevant data from non-Federal sources to promote the development of a national nutritional status network;

(11) compile an inventory of Federal, State, and nongovernment activities related to nutrition monitoring and related research;

(12) focus on national nutrition monitoring needs while building on the responsibilities and expertise of the individual membership of the Board;

(13) administer the coordinated program, define program objectives, priorities, oversight, responsibilities, and resources, and define the organization and management of the Board and the Council; and

(14) provide a mechanism for periodically evaluating and refining the coordinated program and the comprehensive plan that facilitates cooperation and interaction by State and local governments, the private sector, scientific communities, and health care professionals, and that facilitates coordination with non-Federal activities.

(c) The comprehensive plan shall—

(1) allocate all of the projected functions and activities under the coordinated program among the various Federal agencies and offices that will be involved;

(2) contain an affirmative statement and description of the functions to be performed and activities to be undertaken by each of such agencies and offices in carrying out the coordinated program; and

(3) constitute the basis on which each agency participating in the coordinated program requests authorizations and appropriations for nutrition monitoring and related research during the ten-year period of the program.

(d)(1) Within twelve months after the date of enactment of this Act, the Secretaries shall publish in the Federal Register a proposed comprehensive plan for public review for a comment period of no less than sixty days.

(2) Within sixty days after the comment period under paragraph (1) expires, and after considering any comments received, the Secretaries shall submit to the President, for submission to the Congress and for publication in the Federal Register, the final comprehensive plan.

(e) Nothing in this section may be construed as modifying, or as authorizing the Secretaries or the comprehensive plan to modify, any provision of an appropriation Act (or any other provision of law relating to the use of appropriated funds) that specifies—

(1) the department or agency to which funds are appropriated; or

(2) the obligations of such department or agency with respect to the use of such funds.

IMPLEMENTATION OF THE COMPREHENSIVE PLAN

SEC. 104. (a) The comprehensive plan shall be carried out during the period ending with the close of the ninth fiscal year following the fiscal year in which the comprehensive plan is submitted in its final form under section 103(d)(2), and shall be—

(1) carried out in accord with, and meet the program objectives specified in, section 103(a) and paragraphs (1) through (11) of section 103(b);

(2) managed in accord with paragraphs (12) through (14) of section 103(b);

(3) carried out, by the Federal agencies involved, in accord with the allocation of functions and activities under section 103(c); and

(4) funded by appropriations made to such agencies for each fiscal year of the program.

(b) Nothing in this title may be construed to grant any new regulatory authority or to limit, expand, or otherwise modify any regulatory authority under existing law, or to establish new criteria, standards, or requirements for regulation under existing law.

SCIENTIFIC RESEARCH AND DEVELOPMENT IN SUPPORT OF THE COORDINATED PROGRAM AND COMPREHENSIVE PLAN

SEC. 105. The Secretaries shall coordinate the conduct of, and may contract with the National Science Foundation, the National

Aeronautics and Space Administration, the National Oceanic and Atmospheric Administration, the National Institute of Standards and Technology, and other suitable Federal agencies, for such scientific research and development as may be necessary or appropriate in support of the coordinated program and the comprehensive plan and in furtherance of the purposes and objectives of this Act.

ANNUAL BUDGET SUBMISSION

SEC. 106. (a) The President, at the same time as the submission of the annual budget to the Congress, shall submit a report to the Committees on Agriculture and Science, Space, and Technology of the House of Representatives and to the Committees on Agriculture, Nutrition, and Forestry and Governmental Affairs of the Senate on expenditures required for carrying out the coordinated program and implementing the comprehensive plan. The report shall detail, for each of the agencies that are allocated responsibilities under the coordinated program—

(1) the amounts spent on the coordinated program during the fiscal year most recently ended;

(2) the amounts expected to be spent during the current fiscal year; and

(3) the amounts requested in the annual budget for the fiscal year for which the budget is being submitted.

(b) Nothing in this title is intended to either—

(1) authorize the appropriation or require the expenditure of any funds in excess of the amount of funds that would be authorized or expended for the same purposes in the absence of the coordinated program; or

(2) limit the authority of any of the participating agencies to request and receive funds for such purposes (for use in the coordinated program) under other laws.

TITLE II—NATIONAL NUTRITION MONITORING ADVISORY COUNCIL

ESTABLISHMENT OF THE COUNCIL

SEC. 201. (a)(1) The President shall establish, within ninety days after the date of the enactment of this Act, a National Nutrition Monitoring Advisory Council. The Council shall assist in carrying out the purposes of this Act, provide scientific and technical advice on the development and implementation of the coordinated program and comprehensive plan, and serve in an advisory capacity to the Secretaries.

(2) The Council shall consist of nine voting members, of whom—

(A) five members shall be appointed by the President; and

(B) four members shall be appointed by Congress, of whom—

(i) one shall be appointed by the Speaker of the House of Representatives;

(ii) one shall be appointed by the minority leader of the House of Representatives;

(iii) one shall be appointed by the President pro tempore of the Senate; and

(iv) one shall be appointed by the minority leader of the Senate.

(3) The Council also shall include the joint chairpersons of the Board as ex officio nonvoting members.

(b) Each person appointed to the Council shall be—

(1) eminent in the field of administrative dietetics, clinical dietetics, community nutrition research, public health nutrition, nutrition monitoring and surveillance, nutritional biochemistry, food composition and nutrient analysis, health statistics, management, epidemiology, food technology, clinical medicine, public administration, health education, nutritional anthropology, food consumption patterns, food assistance programs, agriculture, or economics; and

(2) selected solely on the basis of an established record of distinguished service.

(c) The persons appointed to the Council by the President shall include—

(1) one member who is a director of a nutrition research unit that is primarily supported by Federal funds, and who has a specialized interest in nutrition monitoring;

(2) one member who is an employee of a State government and has a specialized interest in nutrition monitoring;

(3) one member who is an employee of a local government and has a specialized interest in nutrition monitoring; and

(4) one member who is an appointed representative of the Food and Nutrition Board, National Academy of Sciences.

(d) The Council membership, at all times, shall have representatives from various geographic areas, the private sector, academia, scientific and professional societies, agriculture, minority organizations, and public interest organizations.

(e) The Chairperson of the Council shall be elected from and by the Council membership. The term of office of the Chairperson shall not exceed five years. If a vacancy occurs in the Chairpersonship, the Council shall elect a member to fill such vacancy.

(f) The term of office of each of the voting members of the Council shall be five years, except that of the five members first appointed by the President, two shall be appointed for a term of two years, two for terms of three years, and one for a term of four years, as designated by the President at the time of appointment. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which the predecessor of such member was appointed shall be appointed for the remainder of such term. No member shall be eligible to serve continuously for more than two consecutive terms.

(g) The initial members of the Council shall be appointed or designated not later than ninety days after the date of the enactment of this Act.

(h) The Council shall meet on a regular basis at the call of the Chairperson, or on the written request of one-third of the members. A majority of the appointed members of the Council shall constitute a quorum.

(i) Appointed members of the Council may not be employed by the Federal Government and shall be allowed travel expenses as authorized by section 5703 of title 5, United States Code.

(j) The Administrator of Nutrition Monitoring and Related Research (if appointed under section 101(d)) shall serve as the Executive Secretary of the Council.

(k) The Council shall terminate ten years after the final comprehensive plan is prepared under section 103.

FUNCTIONS OF THE COUNCIL

SEC. 202. The Council shall—

(1) provide scientific and technical advice on the development and implementation of all components of the coordinated program and the comprehensive plan;

(2) evaluate the scientific and technical quality of the comprehensive plan and the effectiveness of the coordinated program;

(3) recommend to the Secretaries, on an annual basis, means of enhancing the comprehensive plan and the coordinated program; and

(4) submit to the Secretaries annual reports that—

(A) shall contain the components specified in paragraphs (2) and (3); and

(B) shall be included in full in the biennial reports of the Secretaries to the President for transmittal to Congress under section 102(b).

TITLE III—DIETARY GUIDANCE

ESTABLISHMENT OF DIETARY GUIDELINES

SEC. 301. (a)(1) By January 1, 1990, and at least every five years thereafter, the Secretaries shall publish a report entitled "Dietary Guidelines for Americans". Each such report shall contain nutritional and dietary information and guidelines for the general public, and shall be promoted by each Federal agency in carrying out any Federal food, nutrition, or health program.

(2) The information and guidelines contained in each report required under paragraph (1) shall be based on the preponderance of the scientific and medical knowledge which is current at the time the report is prepared.

(b)(1) Any Federal agency which proposes to issue any dietary guidance for the general population or identifed population subgroups, shall submit the text of such guidance to the Secretaries sixty days before the publication of the notice of availability for comment required to be published in the Federal Register under this section.

(2)(A) During the sixty-day review period established in paragraph (1), the Secretaries shall review and approve or disapprove such guidance to assure that the guidance either is consistent with the "Dietary Guidelines for Americans" or that the guidance is based on medical or new scientific knowledge which is determined to be valid by the Secretaries. If after such sixty-day period neither Secretary notifies the proposing agency that such guidance has been disapproved, then such guidance may be issued by the agency. If both Secretaries disapprove of such guidance, it shall be returned to the agency. If either Secretary finds that such guidance is incon-

sistent with the "Dietary Guidelines for Americans" and so notifies the proposing agency, such agency shall follow the procedures set forth in this subsection before disseminating such proposal to the public in final form. If after such sixty-day period, either Secretary disapproves such guidance as inconsistent with the "Dietary Guidelines for Americans" the proposing agency shall—

(i) publish a notice in the Federal Register of the availability of the full text of the proposal and the preamble of such proposal which shall explain the basis and purpose for the proposed dietary guidance;

(ii) provide in such notice for a public comment period of thirty days; and

(iii) make available for public inspection and copying during normal business hours any comment received by the agency during such comment period.

(B) After review of comments received during the comment period either Secretary may approve for dissemination by the proposing agency a final version of such dietary guidance along with an explanation of the basis and purpose for the final guidance which addresses significant and substantive comments as determined by the proposing agency.

(C) Any such final dietary guidance to be disseminated under subparagraph (B) shall be announced in a notice published in the Federal Register, before public dissemination along with an address where copies may be obtained.

(D) If after the thirty-day period for comment as provided under subparagraph (A)(ii), both Secretaries disapprove a proposed dietary guidance, the Secretaries shall notify the Federal agency submitting such guidance of such disapproval, and such guidance may not be issued, except as provided in subparagraph (E).

(E) If a proposed dietary guidance is disapproved by both Secretaries under subparagraph (D), the Federal agency proposing such guidance may, within fifteen days after receiving notification of such disapproval under subparagraph (D), request the Secretaries to review such disapproval. Within fifteen days after receiving a request for such a review, the Secretaries shall conduct such review. If, pursuant to such review, either Secretary approves such proposed dietary guidance, such guidance may be issued by the Federal agency.

(3) For purposes of this subsection, the term "dietary guidance for the general population" does not include any rule or regulation issued by a Federal agency.

(4) For purposes of this subsection, the term "identified population subgroups" shall include, but not be limited to, groups based on factors such as age, sex, or race.

(c) This section does not place any limitations on—

(1) the conduct or support of any scientific or medical research by any Federal agency;

(2) the presentation of any scientific or medical findings or the exchange or review of scientific or medical information by any Federal agency; or

(3) the authority of the Food and Drug Administration under the provisions of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321 et seq.).

NUTRITION TRAINING REPORT

SEC. 302. The Secretary of Health and Human Services, in consultation with the Secretaries of Agriculture, Education, and Defense, and the Director of the National Science Foundation, shall submit, within one year after the date of enactment of this Act, a report describing the appropriate Federal role in assuring that students enrolled in United States medical schools and physicians practicing in the United States have access to adequate training in the field of nutrition and its relationship to human health.

V. SECTION-BY-SECTION ANALYSIS

Section 1 designates the bill as the "National Nutrition Monitoring and Related Research Act of 1989".

Section 2 enumerates the purpose of the bill, which are to: (1) make more effective use of federal and state expenditures for nutrition monitoring; (2) establish and facilitate the timely implementation of a coordinated National Nutrition Monitoring and Related Research Program; (3) establish and implement a comprehensive plan for the National Nutrition Monitoring and Related Research Program to assess, on a continuing basis, the dietary and nutritional status of the people of the United States; (4) establish and improve the quality of national nutritional and health status data and related data bases and networks, and stimulate research necessary to develop uniform indicators, standards, methodologies, technologies, and procedures for nutrition monitoring; (5) establish a central federal focus for the coordination, management, and direction of federal nutrition monitoring activities; (6) establish mechanisms for addressing the nutrition monitoring needs of federal, state, and local governments, the private sector, scientific and engineering communities, health care professionals, and the public in support of the foregoing purposes; and (7) provide for the conduct of such scientific research and development as may be necessary or appropriate in support of such purposes.

Section 3 defines the key terms employed in the bill.

Title I section 101(a) establishes a ten-year coordinated program, named the National Nutrition Monitoring and Related Research Program. Section 101(b) assigns the responsibility for the implementation of the coordinated program to the Secretary of the Department of Agriculture and the Secretary of Health and Human Services.

To aid in the implementation of the coordinated program, section 101(c) establishes an Interagency Board of Nutrition Monitoring and Related Research, naming an Assistant Secretary in the Department of Agriculture and an Assistant Secretary in the Department of Health and Human Services as joint chairpersons.

Section 101(d) grants the Secretaries the authority to appoint a full-time Administrator of Nutrition Monitoring and Related Research as the coordinator for the program. The section also establishes that the Administrator will be an individual who is eminent in the field of nutrition monitoring and related areas and who will be selected on the basis of his or her established record of expertise and distinguished service. The Administrator will administer the coordinated program with the advice and counsel of the joint chair-

person of the Board, serve as the focal point for the coordinated program, and serve as the Executive Secretary for the National Nutrition Monitoring Advisory Council.

Section 102(a) outlines the functions of the Secretaries, who, with the advice of the Board, are to: (1) establish the goals of the coordinated program, identify the activities required to meet such goals, and identify the responsible agencies with respect to the coordinated program; (2) update the Joint Implementation Plan for a Comprehensive National Nutrition Monitoring System and integrate it into the coordinated program; (3) ensure the timely implementation of the coordinated program and the comprehensive plan prepared under section 103 of the bill; (4) include in the coordinated program and in the comprehensive plan a competitive grants program to encourage and assist federal and non-federal entities, on an appropriate matching funds basis, in the conduct of research that will accelerate the development of uniform and cost-effective standards and indicators for the assessment and monitoring of nutritional and dietary status and for relating food consumption patterns to nutritional and health status; (5) include in the coordinated program and the comprehensive plan a grants program to encourage and assist state and local governments in developing the capacity to conduct monitoring and surveillance of nutritional status, food consumption, and nutrition knowledge and in using such capacity to enhance nutrition services; (6) include in the coordinated program each fiscal year an annual interagency budget for each fiscal year of the program; (7) foster productive interaction, with respect to nutrition monitoring and related research, among federal efforts, state and local governments, the private sector, scientific communities, health professionals, and the public; (8) contract with a scientific body, such as the National Academy of Sciences or the Federation of American Societies for Experimental Biology, to interpret available data analyses, and publish every two years or more frequently if appropriate, a report on the dietary, nutritional, and health-related status of the people of the United States and the nutritional quality, as defined in the bill, of the national food supply; (9) foster cost recovery management techniques in the coordinated program and impose appropriate charges and fees for publication of the coordinated program, including print and electronic forms of data and analsysis, and use the proceeds of such charges and fees for purposes of the coordinated program (except that no charge or fee imposed on an educational or other nonprofit organization shall exceed the billual cost incurred by the coordinated program in providing the publications involved).

Section 102(b) requires the Secretaries to submit to the President for transmittal to Congress by January 15 of each alternate year, beginning with January 15 following the date of enactment, a biennial report that shall: (1) evaluate the progress of the coordinated program; (2) summarize the results of each component of the coordinated program, as the components are developed under section 103 of the bill; (3) evaluate the relevant policy implications of the analytical findings and future nutrition monitoring and related research priorities; (4) include in full the annual report of the Council provided for in section 202 of the bill; and (5) include an execu-

tive summary of the report published by the scientific body as provided for in subsection (a)(8) of section 102 of the bill.

Section 103(a) outlines the various aspects that the comprehensive plan for nutrition monitoring and related research shall include. They are: (1) to assess, collate data with respect to, analyze, and report, on a continuous basis, the dietary and nutritional status of the people of the United States and the status of nutrition monitoring; (2) sample representative subsets of identifiable low income populations and assess, analyze, and report, on a continuous basis, for representative samples of low income populations, food and household expenditures, participation in food assistance programs and periods experienced when nutrition benefits are not sufficient to provide an adequate diet; (3) sponsor or conduct research necessary to develop uniform indicators, standards, methodologies, technologies, and procedures for conducting and reporting nutrition monitoring and surveillance; (4) develop and keep updated a national dietary and nutritional status data bank, a nutrient data bank, and other data resources as required; (5) assist state and local government agencies in developing procedures and networks for nutrition monitoring and surveillance; and (6) focus the nutrition monitoring activities of the federal agencies.

Section 103(b) requires that the comprehensive plan, at a minimum, include components to: (1) maintain and coordinate the National Health and Nutrition Examination Survey (NHANES) and the Nationwide Food Consumption Survey (NFCS); (2) provide, by 1991 for the continuous collection, processing and analysis of nutritional and dietary status data through stratified probability samples designed to permit accelerated data analysis; (3) maintain and enhance other federal nutrition monitoring efforts such as the Centers for Disease Control Nutrition Surveillance Program and the Food and Drug Administration Total Diet Study; (4) incorporate in survey design military and (where appropriate) institutionalized populations; (5) complete the analysis and interpretation of the data sets from NHANES and NFCS collected before 1984 within the first year of the comprehensive plan; (6) improve the methodologies and technologies, including those suitable for use by states and localities, available for the assessment of nutritional and dietary status and trends; (7) develop uniform standards and indicators for the assessment and monitoring of nutritional and dietary status for relating food consumption patterns to nutritional and health status; (8) establish national baseline data and procedures for nutrition monitoring and for use in the evaluation of federal food and nutrition programs; (9) provide scientific and technical assistance, training, and consultation to state and local governments for the purpose of obtaining dietary and nutritional status data and developing related data bases and networks and promoting the development of regional, state and local data collection services to become an integral component of a national nutritional status network; (10) establish mechanisms to identify the needs of users of nutrition monitoring data and to encourage the private sector and the academic community to participate in the development and implementation of the comprehensive plan and contribute relevant data from non-federal sources to promote the development of a national nutrition status network; (11) compile an inventory of feder-

al, state, and nongovernment activities related to nutrition monitoring and related research; (12) focus on national nutrition monitoring needs while building on the responsibilities and expertise of the individual membership of the Board; (13) administer the coordinated program, define program objectives, priorities, oversight, responsibilities, and resources; and (14) provide a mechanism for periodically evaluating and refining the coordinated program and the comprehensive plan that facilitates cooperation and interaction by state and local governments, the private sector, scientific communities, and health care professionals.

Section 103(c) requires that the comprehensive plan allocate projected activities under the coordinated program among the federal agencies and offices that will be involved, contain a description of the functions and activities to be performed by participating agencies and offices, and constitute the basis upon which participating agencies request authorizations and appropriations for nutrition monitoring throughout the duration of the program.

Section 103(d) provides details regarding the submission and availability of the comprehensive plan. Pursuant to this section, within one year of enactment, the Secretaries of USDA and HHS must publish in the Federal Register a proposed comprehensive plan. The plan must be subject to public review and comment for no less than 60 days. Within 60 days of the expiration of the comment period, the Secretaries shall submit in draft form to the President, for submission to Congress and for publication in the Federal Register, the final comprehensive plan.

Subsection 103(e) ensures that nothing in section 103 shall be construed as modifying, or authorizing the Secretaries or the comprehensive plan to modify, any provisions of an appropriation act that specifies either the department or agency to which funds are appropriated or the obligation of such department or agency with respect to the use of such funds.

Section 104(a) provides for the implementation of the comprehensive plan. The comprehensive plan is to be carried out during the period ending with the close of the ninth fiscal year following the fiscal year in which the comprehensive plan is submitted in its final form under section 103(d)(3) of the bill. The plan shall be: (1) carried out in accord with, and meet the program objectives specified in, section 103(a) and paragraphs (1) through (11) of section 103(b) of the bill; (2) managed in accord with paragraphs (12) through (14) of section 103(b) of the bill; (3) carried out, by the federal agencies involved, in accord with the allocation of functions and activities under section 103(c) of the bill; and (4) funded by appropriations made to such agencies for each fiscal year of the program.

Section 104(b) ensures that nothing in Title I may be deemed to grant any new regulatory authority or to limit, expand, or otherwise modify any regulatory authority under existing law, or to establish new criteria, standards, or requirements for regulation under existing law.

Section 105 requires the Secretaries to coordinate the conduct of, and may contract with, the National Science Foundation, the National Aeronautics and Space Administration, the National Oceanic and Atmospheric Administration, the National Institute of Stand-

ards and Technology, and other suitable federal agencies, for scientific research and development as necessary in support of the coordinated program and the comprehensive plan.

Section 106(a) requires the President to submit a report to the appropriate congressional committees on the expenditures required to carry out and implement the comprehensive plan. The report shall detail: (1) amounts expended on the coordinated program during the fiscal year ending immediately before the report's issuance; (2) amounts expected to be expended on the program during the current fiscal year; and (3) amounts requested in the annual budget for the fiscal year for which the budget is being submitted.

Section 106(b) states that nothing in Title I is intended either to (1) authorize the appropriation or require the expenditure of any funds in excess of the amount of funds that would be authorized or expended for the same purposes in the absence of the coordinated program, or (2) limit the authority of any of the participating agencies to request and receive funds for those purposes (for use in the coordinated program) authorized under other laws.

Title II, section 201(a) requires the President to establish, within ninety days after the date of enactment of the bill, a National Nutrition Monitoring Advisory Council. The Council shall assist in carrying out the purposes of the bill, provide scientific and technical advice on the development and implementation of the coordinated program and comprehensive plan, and serve in an advisory capacity to the Secretaries. The Council shall consist of nine voting members, of whom five members shall be appointed by the President and four shall be appointed by Congress, one by the Speaker of the House of Representatives, one by the minority leader of the House of Representatives, one by the President pro tempore of the Senate, and one by the minority leader of the Senate. The Council shall also include the joint chairpersons of the Board as ex officio nonvoting members.

Section 201(b) outlines the qualifications of those appointed to the Council. Each person appointed to the Council shall be: (1) eminent in the field of administrative dietetics, clinical dietetics, community nutrition research, public health nutrition, nutrition monitoring and surveillance, nutritional biochemistry, food, composition and nutrient analysis, health statistics management, epidemiology, food technology, clinical medicine, public administration, health education, nutritional anthropology, food consumption patterns, food assistance programs, agriculture, or economics; and (2) selected solely on the basis of an established record of distinguished service.

Sections 201(c) and (d) detail the required affiliations of those appointed to the Council. The persons appointed by the President shall include: (1) one member who is a director of a nutrition research unit that is primarily supported by federal funds and who has a specialized interest in nutrition monitoring; (2) one member who is an employee of a state government and has a specialized interest in nutrition monitoring; (3) one member who is an employee of a local government and has a specialized interest in nutrition monitoring; and (4) one member who is an appointed representative of the Food and Nutrition Board, National Academy of Science. In addition, the Council membership, at all times, shall have

representatives from various geographic areas, the private sector, academia, scientific and professional societies, agriculture, minority organizations, and public interest organizations.

Section 201(e) sets the terms of the election of a chairperson of the Council. The chairperson shall be elected from and by the Council membership. The term of office of the chairperson shall not exceed five years. When a vacancy occurs in the chairpersonship, the Council shall elect a member to fill such vacancy.

Section 201(f) details the terms of office of the voting members of the Council and provides for appointments to fill vacant positions. The term of office of each voting member of the Council shall be five years, except that of the five members first appointed by the President, two shall be appointed for terms of two years, two for terms of three years, and one for a term of four years, as designated by the President at the time of appointment. Any member appointed to fill a vacancy occurring before the expiration of the term for which his or her predecessor was appointed shall be appointed for the remainder of such term. No member shall be eligible to serve continuously for more than two consecutive terms.

Section 201(g) requires that the initial members of the Council be appointed or designated not later than ninety days after the date of enactment of the bill.

Section 201(h) requires the Council to meet on a regular basis at the call of the chairperson, or on the written request of one-third of the members. A majority of the appointed members of the Council shall constitute a quorum.

Section 201(i) requires that an appointed member of the Council not be employed by the federal government and shall be allowed travel expenses as authorized by section 5703 of title 5, United States Code.

Section 201(j) permits the Administrator of Nutrition Monitoring and Related Research, if appointed under section 101(d) of the bill, to serve as the Executive Secretary of the Council.

Section 201(k) provides for the termination of the Council two years after the first comprehensive plan is prepared.

Section 202 details the functions of the Council. The Council shall: (1) provide scientific and technical advice on the development and implementation of all components of the coordinated program and the comprehensive plan; (2) evaluate the scientific and technical quality of the comprehensive plan and the effectiveness of the coordinated program; (3) recommend to the Secretaries, on an annual basis, means of enhancing the comprehensive plan and the coordinated program; and (4) submit to the Secretaries annual reports that shall contain the components specified in paragraphs (2) and (3) of this section of the bill, and that shall be included in full in the Secretaries' biennial reports to the President for transmittal to Congress under section 102(b) of the bill.

Title III, section 301(a) requires the Secretaries to jointly issue and publish the report "Dietary Guidelines for Americans" by January 1, 1990, and at least every five years thereafter. Information contained within these reports must be based on the preponderance of the scientific and medical knowledge that is current at the time the reports are prepared.

Section 301(b)(1) requires any federal agency planning to issue dietary guidance for the general population or for identified population subgroups to submit the guidance to the Secretaries for review for consistency with the report "Dietary Guidelines for Americans". The guidance is to be submitted 60 days before publication in the Federal Register of a notice of availability for comment, as provided for in section 301.

Section 301(b)(2)(A) requires the Secretaries to approve or disapprove the proposed guidance to assure that the guidance is either consistent with the "Dietary Guidelines for Americans" or that the guidance is based on medical or new scientific knowledge which the Secretaries determined to be valid. If, after the 60-day review period, neither Secretary notifies the proposing agency that such guidance has been disapproved, then the guidance may be issued by the agency. If both Secretaries disapprove of the proposed guidance, it must be returned to the agency. If either Secretary finds the proposed guidance inconsistent with the "Dietary Guidelines for Americans" and notifies the agency of such finding, the agency shall: (1) publish a notice in the Federal Register of the availability of the full text of the proposal and the preamble of the proposal, which explains the basis and purpose for the guidance; (2) provide in the notice for a public comment period of 30 days; and (3) make available for public inspection during normal business hours any comment received by the agency during the comment period. Any dietary guidance pending on the date of enactment of the bill, and any dietary guidance proposed to be issued after the date of enactment, shall be subject to the provisions of this section.

Section 301(b)(2)(B) states that after review of any comments received during the comment period, either Secretary may approve for dissemination by the proposing agency a final version of the proposed dietary guidance that includes an explanation of the basis and purpose for the final guidance, which addresses significant and substantive comments, as determined by the proposing agency.

Section 301(b)(2)(C) states that any final dietary guidance disseminated under subparagraph (B) shall be announced through the Federal Register in a notice that includes an address where copies may be obtained.

Section 301(b)(2)(D) states that if both Secretaries disapprove a proposed dietary guidance after the 30-day comment period provided under subparagraph (A)(ii), the Secretaries shall notify the agency submitting the proposed guidance of such disapproval, and such guidance may not be issued, except as provided in subparagraph (E).

Section 301(b)(2)(E) states that if both Secretaries disapprove a proposed dietary guidance under subparagraph (D), the agency proposing such guidance may, within 15 days after receiving notification of such disapproval, request the Secretaries to review such disapproval. The Secretaries must complete their review within 15 days after receiving a request for such review. If either Secretary approves the proposed guidance at the conclusion of such 15-day review period, such guidance may be issued immediately by the agency.

Section 301(b)(3) states that for subsection 301(b), the term "dietary guidance for the general population" does not include any rule

or regulation issued by a federal agency. This subsection is not intended to modify the federal rulemaking issued by a federal agency from the administrative review process, which shall include a notice, comment, and review period.

Section 301(c) states that section 301 does not limit: (1) the conduct or support or any scientific or medical research by any federal agency; or (2) the presentation of any scientific or medical finding or the exchange or review of scientific or medical information by any federal agency; or the authority of the Food and Drug Administration under the provisions of the Federal Food, Drug, and Cosmetic Act.

Section 302 requires the Secretaries of Agriculture, Education, and Defense, and the Director of the National Science Foundation, to submit within one year of the bill's enactment a report describing the appropriate federal role in assuring that students enrolled in medical schools in the U.S. and physicians practicing in the U.S. have access to adequate training in the field of human nutrition and its relationship to health.

VI. AGENCY VIEWS

The Committee notes that the United States Department of Agriculture [USDA] has raised objections to S. 253. In addition, the Committee notes that the U.S. Department of Justice has expressed concern about certain sections of S. 253 and has provided the following letter. An analysis of the Department of Justice's letter, prepared by the American Law Division of the Congressional Research Service, follows the letter.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, July 21, 1989.

Hon. JOHN GLENN,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The following represents the views of the Department of Justice on section 201(a)(2) of S. 253, a bill "to establish a coordinated National Nutrition Monitoring and Related Research Program, and a comprehensive plan for the assessment of the nutritional and dietary status of the United States population and the nutrition quality of food consumed in the United States, with the provision for the conduct of scientific research and development in support of such program and plan." The Department of Justice defers to the Department of Agriculture and Health and Human Services as to the Administration's position on S. 253 as a whole. However, we have certain constitutional policy concerns about section 201(a)(2), which are set forth below.

The bill would require the Secretary of Agriculture and the Secretary of Health and Human Services to develop a coordinated program to maintain and improve the nutritional status of the people of the United States. Section 101. The bill further provides that the Secretaries implement a comprehensive research and monitoring plan that would include plans to assess, analyze, and report on the dietary and nutritional status of the United States population. Section 103. Title II provides that the President shall establish a Na-

tional Nutrition Monitoring Advisory Council (Council), which would provide scientific and technical advice on the development and implementation of the coordinated program and comprehensive plan, and serve in an advisory capacity to the Secretaries.

Our concern arises from section 201(a)(2), which provides that the Council will consist of nine voting members, five to be appointed by the President and four to be appointed by Congress. We believe that this dual appointment power raises separation of powers concerns. Although the branches of government are not "hermetically" sealed from one another, *Buckley* v. *Valeo,* 424 U.S. 1, 121 (1976), the separation identity, and that functions be clearly assigned among the separate branches. *Buckley* v. *Valeo,* 424 U.S. at 120–124; *INS* v. *Chadha,* 462 U.S. 919, 951 (1983). Title II of the bill provides that the Advisory Council is to advise heads of two executive branch departments, an action that clearly constitutes an executive function. On the other hand, section 201(a)(2)(B) provides that four Council members be appointed by Congress, rather than the President or another executive branch officer. We believe that under the most reasonable reading of the bill, Title II attempts to establish an executive branch advisory council. However, under the language of this bill, the Council is not clearly legislative or executive and would be in the difficult position of having to serve two masters.

We are advised by the Office of Management and Budget that there is no objection to the presentation of this report to Congress, and that enactment of section 210(a)(2) of S. 253 would not be in accord with the program of the President.

Sincerely,

CAROL T. CRAWFORD,
Assistant Attorney General.

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, August 18, 1989.

To: Senate Committee on Governmental Affairs, Attention: Eileen Choffnes.

From: American Law Division.

Subject: Separation of Powers Concerns Raised in Relation to a Proposed National Nutrition Monitoring Advisory Council.

This memorandum responds to your request for analysis of constitutional issues raised by S. 253. The bill directs the Secretary of Agriculture and the Secretary of Health and Human Services to develop a National Nutrition Monitoring and Related Research Program, and also to develop a comprehensive plan for implementing the program. The bill also would establish a National Nutrition Monitoring Advisory Council to advise the Secretaries and to prepare annual reports on the quality and effectiveness of the coordinated program and comprehensive plan. The annual reports are to be "included in full" in biennial reports that the Secretaries are required to submit to the President and to Congress. You ask our comment on concerns raised by the Justice Department in a July 21, 1989 letter from Assistant Attorney General Carol T. Crawford to the Committee's Chairman. The concerns, based on general separation of powers principles and not on the Constitution's Appoint-

ments Clause, relate to the fact that four of the Council's nine members are to be appointed by congressional officers rather than by the President.

To place the separation of powers issue in proper perspective, we first briefly summarize relevant interpretations of the Appointments Clause.

APPOINTMENTS CLAUSE

Because the functions of the Council would be solely advisory, the presence on the Council of persons appointed by congressional officers wold not be inconsistent with the requirements of the Appointments Clause of the Constitution, Art. II, § 2, cl. 2., as interpreted by the Supreme Court in *Buckley v. Valeo.*[1]

The Appointments Clause requires appointment by the President, and confirmation by the Senate, of "all officers of the United States" whose appointments are not otherwise provided for in the Constitution. Congress may provide for the appointment of "inferior officers" by the President alone, by the courts, or by heads of Departments. In *Buckley* the Court determined that "any appointee exercising significant authority pursuant to the laws of the United States, is [either] an 'Officer of the United States' " who must be appointed by the President and confirmed by the Senate, or is an "inferior officer" who must be appointed by the President, the courts, or a Head of a Department.[2] Note that, although the Court used the term "Officers of the United States," it borrowed from *United States v. Germaine* [3] in redefining the term to include both "Officers of the United States" (principal officers) and "inferior officers" in the Appointments Clause sense.[4]

The Court further ruled in *Buckley* that members of the Federal Election Commission were "exercising significant authority pursuant to the laws of the United States" when they "exercised the Commission's enforcement powers, exemplified by its discretionary power to seek judicial relief" and when they exercised "the Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself." [5] Four of the voting members of the FEC were appointed by congressional officers and the other two by the President; these members were subject to confirmation not by the Senate alone, but by both Houses of Congress. This arrangement, the Court held, violated the Appointments Clause to the extent that the FEC was vested with executive powers.

Other functions of the FED, the Court ruled, could be performed by those neither "officers of the United States" nor "inferior officers." These were the functions "essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees." [6]

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[1] 424 U.S. 1 (1976).
[2] 424 U.S. at 126.
[3] 99 U.S. 508 (1879).
[4] 424 U.S. at 125–26.
[5] 424 U.S. at 138, 140.
[6] 424 U.S. at 137.

Because the solely advisory nature of the proposed Council's functions seems "sufficiently removed from the administration and enforcement of the public law" and because these functions might be described as being "essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees," there appears to be sound basis for concluding that the functions may be performed by persons neither "Officers of the United States" nor "inferior officers." [7]

It is also perhaps noteworthy that the Court in *Morrison* v. *Olson* [8] rejected a contention that "interbranch appointments," in which an officer of one branch is appointed by officers of another branch, are necessarily invalid under the Appointments Clause. There the Court upheld a provision under which a special court composed of Article III judges is empowered to appoint independent counsels to investigate and prosecute executive branch officials accused of wrongdoing. The Appointments Clause supplies textual support for such an arrangement, since is authorizes the Congress "as they think proper" to vest appointment of inferior officers in the President, "in the courts of law," or in the Heads of Departments. While there is no such textual support for Congress reserving to itself authority to appoint inferior officers, the fact that the Court has read into the Clause sufficient flexibility to permit interbranch appointment of *officers* suggests that there is no general separation-of-powers ban on interbranch appointment of advisory personnel whose responsibilities do not rise to the level of primary or inferior officers in the constitutional sense.

SEPARATION OF POWERS

The Department's brief analysis merely states that "this dual appointment power raises separation of powers concerns," and suggests that each branch of government must maintain its separate identity, and that functions and responsibilities must be "clearly assigned among the separate branches." [9] The letter then proceeds to label as "an executive function" the advising of an executive branch department, suggests that the Council would be an executive branch "advisory council," and concludes that the Council would be placed "in the difficult position of having to serve two masters." Although the letter cites a few cases in support of its first general proposition, it cites no authority for the rest of its assertions, and does not explicitly state that the bill would be unconstitutional. We too see no constitutional infirmity.

While the Justice Department cites Supreme Court opinions in support of this generalized separation of powers argument, it seems clear from a reading of these and other authorities that the Court has not required so rigid a separation. Within the framework of

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[7] 424 U.S. at 139, 137.

[8] 486 U.S. — 108 S. Ct. 2597 (1988).

[9] A line from the Justice Department's boilerplate objection to this sort of arrangement was apparently omitted from our copy of the July 21 letter, which reads in relevant part: "Although the branches of government are not 'hermetically' sealed from one another, *Buckley* v. *Valeo*, 424 U.S. 1, 121 (1976), the separation identity, and that functions be clearly assigned among the separate branches." The omitted text can be found in an earlier rendition. *See* Letter from Assistant Attorney General John R. Bolton to the Honorable John Glenn, April 27, 1987, reprinted in S. Rep. No. 301 100th Cong., 2d Sess. 7 (1988) (relating to comparable pay bill).

three separate branches exercising three distinct powers, there is room for "play in the joints" permitting cooperation and interdependence necessary to a workable government.

> [T]he rule is that in the actual administration of the government Congress * * * should exercise the legislative power, the President * * * the executive power, and the Courts * * * the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination.[10]

The basic question, then, is whether executive power would be assumed by the Congress or legislative power conferred upon the Executive. The analysis of the Appointments Clause issue, supra, suggests that this is not the case.

Separation of powers principles may be violated even in the absence of conflict with one of the Constitution's specific provisions, such as the Appointments Clause. But in order to find such a violation, a court must determine that one branch has intruded into the province of another branch to such an extent that it disrupts the other branch in performing its constitutionally assigned functions. The Supreme Court has taken a "pragmatic, flexible" approach to such inquiries. For example, in holding that the Presidential Recordings and Materials Preservation Act does not violate separation of powers principles, the Court explained that,

> In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[11]

Just last Term, the Court restated the governing principles while upholding the placement of the Sentencing Commission in the judicial branch.

> It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence

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[10] *Hampton & Co.* v. *United States*, 276 U.S. 394, 406 (1928), quoted also in *Buckley* v. *Valeo*, 424 U.S. 1, 121-22 (1976).

[11] *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 442-43 (1977).

> and aroused our vigilance. * * * Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single branch powers more appropriately diffused among separate branches or that undermine the authority and independence of one or another coordinate branch. *Bowsher* v. *Synar,* 478 U.S. 714 (1986) (Congress may not exercise removal power over officer performing executive functions); *INS* v. *Chadha, supra* (Congress may not control execution of laws except through Art. I procedures); *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.,* 458 U.S. 50 (1982) (Congress may not confer Art. III power of Art. I judge). By the same token, we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment. *Morrison* v. *Olson, supra* (upholding judicial appointment of independent counsel); *Commodity Futures Trading Comm'n* v. *Schor,* 478 U.S. 833 (upholding agency's assumption of jurisdiction over state-law counterclaims).[12]

S. 253 does not appear to pose dangers of aggrandizement or encroachment comparable to those posed by invalidated laws. *Bowsher* and *Marathon, supra,* both involved intrusions into core functions of coordinate branches, while *Chadha* involved a departure from constitutionally mandated procedures for lawmaking. The advisory functions of the Nutrition Council do not themselves constitute execution of the laws, nor would they appear to impede the executive in its execution of the law. There is no requirement that the Department heads or anyone else in the executive branch implement the Council's recommendations, nor, in spite of the fact that the two Secretaries must serve as a conduit for transmittal of the Council's report to Congress, is the executive branch constrained in any manner in making its own recommendations to Congress.

By the same token, the statutes recently upheld by the Court against separation-of-powers challenge seemingly implicated constitutional issues of greater magnitude than any posed by S. 253. It was not disputed that independent counsels were exercising important executive functions and therefore were inferior officers under the Appointments Clause, yet the Court upheld the law as leaving the Executive Branch "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." [13] And in upholding the law establishing the Sentencing Commission as an independent rulemaking body within the judicial branch and requiring that Art. III judges be members of the Commission, the Court recognized an exception to the general principle that Article III judges may not be assigned "executive or administrative duties of a nonjudicial nature." [14]

Thus, there seems little basis for asserting that the bill would impede the President's exercise of executive authority to such an

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[12] *Mistretta* v. *United States,* 488 U.S. —, 109 S. Ct. 647, 659-60 (1989).
[13] *Morrison* v. *Olson,* supra n.8, 108 S. Ct. at 2622.
[14] *Mistretta,* supra n.12, 109 S. Ct. at 661.

extent as to offend separation of powers principles of constitutional dimension.

Thus, there seems little basis for asserting that the bill would impede the President's exercise of executive authority to such an extent as to offend separation of powers principles of constitutional dimension.

Finally, it may be noted that there is ample precedent for legislation establishing a national study commission charged with preparing a report for submission to Congress and/or the President, and composed of members chosen by or from both the executive and legislative branches. Note that S. 253, by requiring inclusion "in full" of the Council's annual reports in biennial reports to Congress by the Secretaries,[15] charges the Council with advising the Congress as well as the President and the Secretaries. Among the numerous such commissions are the following: Federal Council on the Aging, Pub. L. 98-459, § 204, 98 Stat. 1769 (1984); Commission on the Bicentennial of the Constitution, Pub. L. 98-101, 97 Stat. 719 (1983); Commission on National Development in Postsecondary Education; Pub. L. 96-374, §§ 102, 103, 94 Stat. 1374-76 (1980); Commission on Wartime Relocation and Interment of Civilians, Pub. L. 96-317, 94 Stat. 964 (1980), amended by Pub. L. 97-3, 95 Stat. 5 (1981); National Commission on Air Quality, Pub. L. 95-95, § 323, 91 Stat. 785 (1977); and the Commission on Federal Paperwork, Pub. L. 93-556, 88 Stat. 1789 (1974).

GEORGE COSTELLO, *Legislative Attorney.*

VII. ESTIMATED COST

Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed the cost implications of S. 253. The following is CBO's estimate of the potential costs of this legislation.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 8, 1989.

Hon. JEFF BINGAMAN,
U.S. Senate,
Washington, DC.

DEAR SENATOR: As you requested, the Congressional Budget Office has prepared a cost estimate for S. 253, the National Nutrition Monitoring and Related Research Act of 1989, as ordered reported by the Senate Committee on Governmental Affairs on July 13, 1989. The CBO estimates the cost to the federal government of this bill would be approximately $850,000 in fiscal year 1990, increasing to about $950,000 in fiscal year 1994. The budgets of state and local governments would not be affected by the enactment of this legislation.

S. 253 would establish guidelines for a comprehensive plan to establish a ten-year National Nutrition Monitoring and Related Research Program that would coordinate current federal nutrition monitoring activities and research, integrate new activities with

[15] S. 253, § 202(4)(B).

existing programs, and help set nutrition priorities in the United States. This bill would not authorize the implementation of the activities included in the plan nor would it authorize funds for those activities. Therefore, additional authorizations for appropriations for establishing and carrying out the activities of the coordinated nutrition program would have to be approved in the future. This applies to funds needed for the fiscal year in which the final comprehensive plan is submitted and for the nine succeeding fiscal years.

This bill, however, would authorize the coordination of the program. Under Title I, the Secretaries of Agriculture and Health and Human Services could appoint a full-time Administrator of Nutrition Monitoring and Related Research within four months of enactment. Funds for salary and overhead for the administrator and additional staff would be needed. We estimate the costs for the administrator and two additional staff to be approximately $350,000 in 1990. This could increase to about $450,000 in fiscal year 1994 due to increases in federal pay levels.

Title I also states that this bill would allow the Secretaries of Health and Human Services (HHS) and Agriculture to contract with scientific agencies for research in support of the comprehensive plan and the coordinate nutrition program. According to staff on the Governmental Affairs Committee, however, the intent of the bill is not to create new contract authority, but simply to encourage the Secretaries to continue to use their current authority to contract with these agencies. Therefore, the CBO estimates that there would be no additional costs associated with contract authority.

Under Title II of this bill, the members of the National Nutrition Advisory Council would be compensated for travel expenses. Assuming it costs an average of $800 per meeting for airfare and accommodations for each of the nine members and that the council meets six times a year, travel costs would be less than $50,000 each year. Costs could be higher or lower depending on the actual number of times the council meets during each year.

Title III would provide for the publication of a report on dietary guidelines in 1990 and continuing every five years. The federal government currently publishes dietary guidelines. The coordination of the guidelines publication could require funds for salary and overhead for an administrator and additional staff. Administrative costs relating to the publication of these guidelines would cost about $350,000 in fiscal year 1990 and could increase to about $450,000 in fiscal year 1994 due to federal pay level increases.

In addition, Title III would require the Secretary of HHS to submit a report on nutrition education in United States medical schools within one year of enactment. Based on the costs of similar studies, the CBO, assuming the study would be conducted by HHS, estimates that it would cost under $100,000. However, the study could cost substantially more if conducted by an outside panel.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Karen Graham (226–2820).

Sincerely,

ROBERT D. REISCHAUER, *Director.*

VIII. EVALUATION OF REGULATORY IMPACT

Paragraph 11(b)(1) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate "the regulatory impact which would be incurred in carrying out the bill."

The adoption of this legislation will significantly improve the collection and analysis of nutrition and health related data. The Committee has determined that there will be a minimal increase in regulatory burden and paperwork in that the Secretaries of the Department of Health and Human Services and the Department of Agriculture will be required to submit a biennial report to Congress.

IX. CHANGES IN EXISTING LAW

Rule XXVI of the Standing Rules of the Senate requires that changes in existing law made by the bill, as reported, be detailed in the Committee Report accompanying the bill. S. 253 will require no changes in current law.

X. COMMITTEE VOTE

On July 13, 1989, a quorum being present, the Committee on Governmental Affairs agreed, by voice vote, to report S. 253 favorably to the Senate. No opposition to the bill was registered by any member.

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